IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	CASE NO. BK01-43159
	)	
ALLAN REETZ and	)	CH. 7
JANICE REETZ,	)	
Debtor(s).	)	

MEMORANDUM

Trial was held on January 29, 2003, in Lincoln, Nebraska, on the Objection to Amended Exemptions by the Gertsch Family Trust and Orville & Dorothy Gertsch (Fil. #39). Darik Von Loh appeared for the debtors, W. Eric Wood appeared for the Gertsches, and Joseph H. Badami appeared as the Chapter 7 Trustee. This memorandum contains findings of fact and conclusions of law required by Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(B).

When this case was originally filed, the debtors listed and claimed as exempt a Morgan Stanley IRA account in the approximate amount of $68,000. Orville and Dorothy Gertsch, who had been in business with Mr. Reetz, objected to the claim of exemption. No resistance was filed with regard to the objection, and the court entered an order granting the objection and denying the exemption. Several months later, the debtors amended their schedules to show that there were actually two Morgan Stanley accounts. One contained approximately $68,000 at the time of filing, and the other contained approximately $101,000 at the time of filing. Mr. and Mrs. Gertsch have once again objected to the claim of exemption, alleging that the debtors knew they had funds in IRA accounts far in excess of $68,000; that they had other assets, including an interest in a farm which had been deeded in 1993 from Mrs. Reetz's mother to her; and that they had transferred a motor vehicle from themselves to their son within one year of the filing of bankruptcy but did not report such transfer on their statement of financial affairs. In addition, it is the position of the objectors that the funds in the accounts should not be exempt because such funds are not reasonably necessary for the support of the debtors.

The debtors then filed a motion to reconsider the denial of the initial exemption claim. That motion to reconsider has been denied.

Trial was held to determine whether the debtors have a right to claim the balance in the IRA account as exempt under Nebraska law. The issues dealt with at the trial included whether the funds in the IRA accounts were reasonably necessary for the support of the debtors and whether the debtors should be denied their claim of exemption because they attempted to hide assets from the court and the creditors.

That portion of the objection to exemptions that deals with "bad faith" of the debtors by failing to list the complete balance in the IRA accounts, by failing to list the ownership interest in the mother's farm, and by failing to list the transfer of the motor vehicle within one year of the bankruptcy petition, is denied.

Both Mr. and Mrs. Reetz testified that in contemplation of filing the bankruptcy petition they provided all of the information concerning the IRAs to their prior attorney and assumed that he used the information to correctly prepare the bankruptcy paperwork. They further testified that although they had possession of the monthly reports from Morgan Stanley, from which they could have determined that the IRA balances shortly prior to bankruptcy exceeded $170,000, they paid little attention to the number placed upon the schedule of assets or in the section claiming the exemption. Mrs. Reetz said that she did not read the bankruptcy paperwork in detail. Mr. Reetz said that he did notice a $68,000 amount, but was not surprised at the total because the IRA had been losing money for several months.

I find that the debtors did not intentionally misstate the amount in the IRA account. Their explanations are credible and they had no motivation to deceive their creditors by misstating the amount because the creditors were aware of the IRA balances from earlier discussions with the debtors. They had listed much higher amounts in financial statements provided in conjunction with their business with Mr. and Mrs. Gertsch. Mr. Gertsch was well aware of the amounts contained in the IRA and the total amounts had even been discussed several months prior to bankruptcy during negotiations for settlement of a lawsuit brought by the Gertsches against the Reetzes. At the first meeting of creditors, Mr. Wood, on behalf of the Gertsches, raised the issue of the inconsistency between the amount listed on the schedules and the amounts discussed several months before. Shortly after the creditors' meeting, the bankruptcy documents were amended to reflect two IRA accounts with a total value of more than $170,000.

Concerning the transfer of an interest in the farm from Mrs. Reetz's mother to her, Mrs. Reetz testified that she knew nothing about it until the matter was brought to her attention at the first meeting of creditors by counsel for Mr. and Mrs. Gertsch. Mr. Reetz testified similarly. Mrs. Reetz also testified that she has received no benefit from the transfer of the real estate interest. Her mother is still in possession of the land, controls the rental of the land and receives all revenues from the land. A sister of Mrs. Reetz testified that she had been unaware that her mother had transferred the land to the daughters until the matter was brought to the attention of Mrs. Reetz at the creditors' meeting.

In contrast to that testimony, Mr. Gertsch testified that Mr. Reetz had told him back in 1993 or 1994 about the conveyance of the real estate interest to Mrs. Reetz. He also testified that in one or more conversations, Mr. Reetz had informed Mr. Gertsch that the initial deed transferring the real estate had a typographical error which resulted in a misspelling of the last name of Mrs. Reetz. As a result, a second deed was necessary and had been recorded. After the bankruptcy was filed, counsel for Mr. Gertsch sent Mr. Gertsch a copy of the bankruptcy paperwork. Mr. Gertsch then went to the county offices and obtained copies of the two deeds referred to above. The dates of the deeds are consistent with the testimony of Mr. Gertsch. Mr. Reetz did not deny the conversation with Mr. Gertsch, and so Mr. Gertsch's testimony stands as unrebutted.

The testimony of Mr. and Mrs. Reetz on this issue is troubling. However, it is likely that even if they had known of a transfer in 1993, they could have forgotten that Mrs. Reetz had an interest in the real estate as they did not then and do not now receive any benefits from the transfer, and failed to tell their attorney about it. The interest is an undivided interest which has now been listed on the schedules and may be administered by the trustee.

The motor vehicle in question is an older vehicle that was used by a son of Mr. and Mrs. Reetz during his college years. It had been titled in the name of the debtors, but their son had partially paid for the vehicle and had possession of it and use of it at all times. Sometime within a year prior to the bankruptcy filing, he decided to trade the vehicle and they signed the title. Failure to list the transfer was inadvertent and, from their point of view, really was not a transfer because they considered him the owner of the vehicle, even though it was titled in their name.

The real issue in this case is whether the amount in the IRA remaining after the denial of the initial claim of exemption is reasonably necessary for the support of the debtors. The applicable Nebraska statute, Neb. Rev. Stat. § 25-1563.01, provides in pertinent part:

> In bankruptcy and in the collection of a money judgment, the following benefits shall be exempt from attachment, garnishment, or other legal or equitable process and from all claims of creditors: To the extent reasonably necessary for the support of the debtor and any dependent of the debtor, an interest held under a stock bonus, pension, profit-sharing, or similar plan or contract payable on account of illness, disability, death, age, or length of service . . . .

Recently the undersigned determined in the case of In re Matthew & Karla Bashara, Case No. BK02-83504 (Bankr. D. Neb. May 20, 2003), that Individual Retirement Accounts are exempt under that statutory provision, subject to a determination of whether the funds in the IRA are "reasonably necessary for the support of the debtor and any dependent of the debtor."

The Nebraska statute referred to above does not define the phrase "reasonably necessary for support." Generally, factors that the bankruptcy courts have considered when making the determination of whether the funds are reasonably necessary for support include the debtor's age; present and anticipated living expenses; present and anticipated income from all sources; ability to work and earn a living; job skills, training and education; other assets, including exempt assets, and the liquidity of other assets; ability to save for retirement; special needs, if any; and financial obligations such as alimony or child support. In re Bowder, 262 B.R. 919, 922-23 (Bankr. D. Minn. 2001) (citing In re Sisco, 147 B.R. 495, 497 (Bankr. W.D. Ark. 1992)).

Judge Minahan, in the case of In re Weaver, 98 B.R. 497 (Bankr. D. Neb. 1988), considered the language of In re Taff, 10 B.R. 101 (Bankr. D. Conn. 1981). That court held:

> [T]he reasonably necessary standard requires that the court take into account other income and exempt property of the debtor, present and anticipated, . . . and that the appropriate amount to be set aside for the debtor ought to be sufficient to sustain basic

> needs, not related to his former status in society or the lifestyle to which he is accustomed but taking into account the special needs. . . .

Weaver, 98 B.R. at 500 (quoting Taff, 10 B.R. at 107)).

Judge Minahan also considered the case of In re McCabe, 74 B.R. 119 (Bankr. N.D. Iowa 1986). That court made a list very similar to the list referred to above in the Bowder case. Other courts that have considered the issue also reviewed the factors listed above. See, e.g., In re Hamo, 233 B.R. 718 (B.A.P. 6th Cir. 1999); In re Burkette, 279 B.R. 388 (Bankr. D.D.C. 2002); In re Skipper, 274 B.R. 807 (Bankr. W.D. Ark. 2002); In re Savage, 248 B.R. 573 (Bankr. E.D. Ark. 2000).

At trial, debtors presented the testimony of an expert witness concerning many of the listed factors. The witness considered the full balance in the accounts, approximately $163,000 as of the date of trial, without deducting the amount for which the debtors had been denied an exemption. He considered the ages of the debtors. He assumed a seven percent interest rate on both the current balance and the future contributions between now and 2021, the date of retirement. He considered a four percent inflation rate and considered projected tax rates. He also considered the estimated amount of Social Security benefits the debtors would receive upon retirement and the fact that Mr. Reetz would receive a pension from his city employment.

The current annual income of the debtors is approximately $40,000. Based on the total current funds on hand, plus estimated Social Security benefits, plus the projected retirement funds from Mr. Reetz's pension plan, the expert witness opined that in order to see at retirement the equivalent of $40,000 per year in today's dollars, the debtors would need a total of $84,000 per year. They would be able to generate that fund using his assumptions and calculations, including the total of more than $160,000 IRA principal. If the principal is reduced by the amount of the denied exemption, they would receive less per year. The expert opined that using his assumptions, including continuing contributions to both the IRA accounts and to Mr. Reetz's pension plan, on the date of retirement the debtors would have approximately $843,000 in available funds. Assuming that the debtors would withdraw seven percent per year, or $58,000, and assuming that they would receive approximately $31,000 in total Social Security benefits, they would have income per year of $89,000, or just a bit more

than $40,000 in today's dollars. The total amount on hand would be drawn down over approximately eighteen years from their retirement date. The expert's assumptions are that Allan Reetz would retire at age 68 and Janice at age 65, both in the year 2021.

The expert's final conclusion was that the funds in the IRA accounts are necessary for the long-term support of the debtors.

The objecting parties presented no evidence in response or rebuttal to the testimony of the expert witness. However, the expert testimony did not exactly track the factors listed above. In considering those factors, I make the following findings: The debtors currently appear to be living modestly and covering their living expenses. Mrs. Reetz earns more than $11 per hour, and Mr. Reetz earns more than $9 per hour at their present positions. They are both approximately 50 years old and have no dependents. Their health does not seem to be in question, and they are both able to work and earn a living. They presented no evidence concerning their job skills, training or education, but both have held and continue to hold decent-paying jobs. They have other assets, including the interest of Mrs. Reetz in her mother's farm, although that asset may be liquidated by the trustee in this case. There is no evidence of liquidity of any other assets nor is there any evidence of special needs, or financial obligations such as alimony or support payments.

In the Weaver case decided by Judge Minahan, he cited authority in Taff "that the appropriate amount to be set aside for the debtor ought to be sufficient to sustain basic needs, not related to his former status in society or the lifestyle to which he is accustomed". It is anticipated at retirement date that the debtors will be eligible for Social Security benefits of approximately $31,000. They will have by that time continued to contribute to both Mr. Reetz's pension plan and to an IRA of Mrs. Reetz, whether it is the Morgan Stanley account or a new account. Those contributions, plus the Social Security income, will enable them to have annual income in the approximate amount of $40,000, assuming that Mr. Reetz stays with the City and draws down a pension on a regular basis and that Mrs. Reetz stays with her employer and makes regular annual contributions to an IRA.

It is pure speculation for a court to attempt to anticipate the rate of inflation or the actual annual dollar needs for any individual eighteen years in the future. However, it does not seem, under the facts of this case, that the debtors need the

IRA cushion of more than $100,000 at this time for their support eighteen years from now.

The IRA in question came to Mrs. Reetz as a result of her employment at Pamida. Apparently there was a qualified profit-sharing or pension plan that was terminated and a distribution was made to employees based upon their years of service. She received a significant distribution and invested it. Initially it increased during the '90s and then, due to the economic situation in this country, it decreased, according to the testimony, by more than $50,000. It is likely that whatever she is allowed to keep as exempt in an IRA account will increase and decrease in a similar fashion, if not at similar rates, during the next eighteen years.

The initial claim of exemption in the approximate amount of $68,000 has already been denied. The debtors have been ordered to turn over to the trustee the net proceeds after taxes and penalties, which will reduce the total amount in their account to approximately $100,000. I find that the $100,000 cushion is excessive and not all necessary for their future support. Therefore, considering all of the above factors, I rule that the total amount of exempt funds that they may keep in the IRA is $50,000. The balance of the account, less taxes and penalties, shall be turned over to the trustee for distribution to creditors. The result of this decision will not put the debtors into poverty. They are healthy and they have good jobs. They are left with a $50,000 account, a pension plan, and the opportunity to continue to contribute to both the City pension plan and to the IRA. They will receive Social Security benefits and, perhaps, raises in each of their jobs.

Separate judgment will be entered.

DATED: July 14, 2003

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

Darik Von Loh	Joseph H. Badami
*W. Eric Wood	U.S. Trustee

Movant (*) is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.

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JUDGMENT

Trial was held on January 29, 2003, in Lincoln, Nebraska, on the Objection to Amended Exemptions by the Gertsch Family Trust and Orville & Dorothy Gertsch (Fil. #39). Darik Von Loh appeared for the debtors, W. Eric Wood appeared for the Gertsches, and Joseph H. Badami appeared as the Chapter 7 Trustee.

IT IS ORDERED: The Objection to Amended Exemptions (Fil. #39) is sustained in part. The total amount of exempt funds that the debtors may keep in the IRA is $50,000. The balance of the account, less taxes and penalties, shall be turned over to the trustee for distribution to creditors.

IT IS FURTHER ORDERED: That portion of the objection that deals with "bad faith" of the debtors by failing to list the complete balance in the IRA accounts, by failing to list the ownership interest in the mother's farm, and by failing to list the transfer of the motor vehicle within one year of the bankruptcy petition, is denied

See the Memorandum filed contemporaneously herewith.

DATED: July 14, 2003

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

Darik Von Loh	Joseph H. Badami
*W. Eric Wood	U.S. Trustee

Movant (*) is responsible for giving notice of this judgment to all other parties not listed above if required by rule or statute.